IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

O'Leary, Cory and Osborne, JJ.

IN THE MATTER OF The Ontario Human Rights Code R.S.O. 1970, c. 318, as amended;

AND IN THE MATTER OF two complaints laid by Harold E. Hall against International Firefighters Association, Local 1137 the Etobicoke Professional Firefighters Association and a complaint against the Borough of Etobicoke Fire Department;

AND IN THE MATTER OF two complaints laid by Vincent Gray against International Firefighters Association, Local 1137 the Etobicoke Professional Firefighters Association and a complaint against the Borough of Etobicoke Fire Department;

B E T W E E N :

THE BOROUGH OF ETOBICOKE

Appellant

- and -

THE ONTARIO HUMAN RIGHTS COMMISSION and BRUCE DUNLOP and HAROLD E. HALL and VINCENT GRAY

Respondents

R. R. Dunsmore, Esq. for The Borough of Etobicoke

J. Polika, Esq., Q.C. for The Ontario Human Rights Commission

H. Goldblatt, Esq. for International Firefighters Association, Local 1137 the Etobicoke Professional Firefighters Association

Heard: June 18, 1979

O'LEARY, J.:

This is an appeal by The Borough of Etobicoke from decisions of a Board of Inquiry consisting of one person,

Mr.Bruce Dunlop, convened in accordance with the provisions of The Ontario Human Rights Code, R.S.O. 1970, c. 318, and amendments thereto, by which decisions the said Borough was found to have contravened s. 4(1)(b) of The Ontario Human Rights Code, and was ordered to reinstate as employees, provided they still possessed the requisite physical and mental capacities, two firefighters who had been retired on their reaching 60 years of age, and to pay to each employee the salary he lost from the date of his retirement until the date of his reinstatement, or the date when it was determined he was not capable of carrying out his work.

Section 4 of The Ontario Human Rights Code reads in part as follows:

> "4. (1) No person shall,
>
> . . .
>
> (b) dismiss or refuse to employ any person;
>
> because of . . . age . . . of such person or employee.
>
> (6) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on age . . . do not apply where age . . . is a bona fide occupational qualification and requirement for the position or employment."

Section 19(a) of The Ontario Human Rights Code reads:

" 19. In this Act,

(a) 'age' means any age of forty years or more and less than sixty-five years;"

The two firefighters, Harold E. Hall and Vincent Gray, had been employed as a district chief and a captain, respectively, in the Fire Department of the said Borough under a collective agreement between the Borough, and the Etobicoke Professional Firefighters Association, Local No. 1137 International Association of Firefighters, which agreement provided that firefighters were to retire at age 60.

Gray was retired by the Borough on September 1, 1976, and Hall was retired on October 1, 1976, each having reached 60 years of age during the month prior to his retirement. Each had asked the Borough to be allowed to continue his employment beyond the age 60 limit, and each was denied his request. Each filled out a complaint of discrimination against the Borough and the Etobicoke Professional Firefighters Association, Local No. 1137. The Board did not find any breach of The Ontario Human Rights Code by the

said Association, but as indicated above, found the Borough of Etobicoke had contravened said s. 4(1)(b).

The problem as to what conduct amounts to a contravention of said s. 4(1)(b), (which is the issue before us on this appeal), when a firefighter has been retired on reaching 60 years of age pursuant to a term in a collective agreement that provides for retirement at that age, has been before this Court and the Ontario Court of Appeal on at least one previous occasion, namely, in Re Ontario Human Rights Commission and City of North Bay. The decision of this Court in that matter is reported in (1977) 17 O.R. (2d) 712.

A review of the findings and reasons of the Board of Inquiry, of this Court, and of the Court of Appeal in the City of North Bay matter, is essential to a proper determination of the issue before us on this appeal.

In the City of North Bay matter, the Minister of Labour appointed R.L. MacKay, Q.C. as a board of inquiry to hear and decide the complaint of one Joseph C. Cosgrove, that his compulsory retirement at the age of 60 was discrimination on account of age contrary to the provisions of The Ontario Human Rights Code. The following appears in the reasons for decision of R.L. MacKay, Q.C.:

" The complainant, Mr. J.C. Cosgrove, was born on July 5, 1915. Accordingly he was sixty years of age on July 31, 1975, when he was required to retire by the Corporation of the City of North Bay from his position as Chief of the Fire Prevention Bureau of the North Bay Fire Department. This enforced retirement was pursuant to a by-law of the Corporation making retirement mandatory at age sixty for all members of the Fire Department. The by-law in question (No. 2085) was enacted in 1963 and reduced the mandatory retirement age from 65 to 60. It was enacted in order to reflect a term to that effect contained in a collective agreement previously concluded between the Corporation and Local 284 of the International Association of Fire Fighters, representing from time to time all employees of the North Bay Fire Department as their exclusive bargaining agent. . . .

. . . at the time of his forced retirement, Mr. Cosgrove enjoyed good general health, in fact he had not missed a single day's work over the past five years and there had been no complaints concerning his work nor any evidence that he was by reason of age physically or mentally unable to satisfactorily perform his functions as Chief Fire Prevention Officer. . . .

Mr. Cosgrove's role as a Fire Prevention Officer, and as Chief of that division of the Fire Department, did not normally entail that he actually be physically engaged in extinguishing a fire. On the contrary such would rarely happen and only in extreme circumstances or emergencies. Mr. Cosgrove could not recall any occasion when he had been called upon to so act. His primary function was to enter buildings or premises as soon as practicable after a fire had been extinguished and investigate the source and origins of the fire and the loss involved. This however, as he admitted, could be dangerous because of the

unsafe condition of gutted buildings and the hazards of walls, roofs and stairs, etc., collapsing. In addition, Mr. Cosgrove's duties included safety inspections of public buildings, such as schools, and considerable paper work in the form of reports to the Fire Marshall's office and for the Department's own files. In terms of chain of command the Chief Fire Prevention Officer ranks fourth in the Departmental hierarchy, behind the Fire Chief, Deputy Chief and the Chief Training Officer. In their absence he assumes charge of the Department. Finally, in accordance with a Department policy statement issued by the Fire Chief in 1972, the Chief Fire Prevention Officer "shall attend all major fires and may be assigned other duties than [his] own to assist the Chief and Deputy Chief".

. . .

The legal issue involved is simple. . . . In short if by-law 2085, and the collective agreement which it reflects and enforces, honestly prescribe a legitimate age qualification for the special occupation of firefighting then, in my opinion, there is no basis of complaint. If such is not the case then, in my opinion, there has been a contravention of the Code in the circumstances of Mr. Cosgrove's forced retirement prior to age 65, considering that he was in good health, in no way disabled, and willing and anxious to continue in service.

. . .

On the essential issue whether age 60, and no older, is a bona fide occupational requirement for the employment of firemen the great bulk of the relevant testimony emerged from the examination of four witnesses . . . These witnesses were Walter Shanahan, a full-time firefighter for 23 years and

Executive Vice-President of the Ontario Professional Fire Fighters Association, of which Local 284 is a part; Alan Wharram, Fire Chief for the City of North Bay; Fire Chief Barr of Sudbury and Lyle Keck, Chief Fire Prevention Officer for the City of Sudbury.

Without exception these gentlemen agreed that the job of a Fire Prevention Officer is a hazardous one, imposing considerable physical and mental stress, albeit perhaps not as much as fire fighting itself. Further they testified that although there was no concrete or explicit medical findings available as proof it was their collective opinion based on years of experience and observation that firemen deteriorate or slow down in performance, and are less capable of coping with the exigencies and urgencies of their employment as they approach or pass the age of sixty. They conceded that the foregoing observation is a general rule and that particular individuals might well be able to perform their duties past the age of sixty just as there would be instances of even younger men being unable to do so. All in all, however, they felt that age 60 was an appropriate "rounding-off" figure to define the safe limits of employment in the interests of the individual himself and of his fellow workers who rely upon him to measure up and pull his weight.

. . .

. . . Mr. Shanahan noted that 60 out of a total of 73 locals within the jurisdiction of the Ontario Professional Fire Fighters Association have adopted a mandatory retirement age of 60 . . .

. . .

In his excellent closing argument Mr. Polika stressed that Mr. Cosgrove was involuntarily retired solely on account of age, which I find as a fact and is, indeed, hardly disputable. He stressed that there was no evidence that Mr. Cosgrove was unfit to continue, but rather the evidence was to the contrary, nor indeed was there any medical evidence in support of a compulsory retirement age of 60 as a bona fide occupational qualification and requirement for the position of municipal firefighter in respect of the physical and mental requirements for the position, and this lack of medical evidence was conceded by the witnesses.

. . .

The issue, simply stated, is whether a mandatory retirement age of sixty, regardless of a particular individual's ability, capacity or competency, is a bona fide occupational qualification and requirement for the position or employment of a fireman within the meaning of sec. 4 (6) of the Human Rights Code.

"Bona fide" is the key word. Reputable dictionaries whether general (such as Oxford and Webster) or legal (such as Black) regularly define the expression in one or several of the following terms, viz., honesty, in good faith, sincere, without fraud or deceit, unfeigned, without simulation or pretense, genuine. These terms connote motive and a subjective standard. Thus a person may honestly believe that something is proper or right even though, objectively, his belief may be quite unfounded and unreasonable. Applying this solely subjective standard I have no doubt whatsoever that the Corporation in enacting by-law 2085 and negotiating the collective agreement upon which it is founded were acting honestly, as opposed to maliciously, deceitfully or for some oblique or ulterior purpose in disguise.

> However, that cannot be the end of the matter or the sole meaning to be attributed to "Bona fide" for otherwise standards would be too ephemeral and would vary with each employer's own opinion (including prejudices), so long as it is honestly held, of the requirements of a job, no matter how unreasonable or unsupportable that opinion might be. Thus an airline may sincerely feel that its stewardesses should not be over 25 years of age. However if it requires such a limitation as a condition of employment or continuing employment I would have no doubt that such limitation would not qualify as a bona fide occupational qualification or requirement under the exemption created by sec. 4(6). Why? Because, in my opinion, such a limitation lacks any objective basis in reality or fact. In other words, although it is essential that a limitation be enacted or imposed honestly or with sincere intentions it must in addition be supported in fact and reason "based on the practical reality of the work a day world and of life".
>
> In my view the age 60 mandatory retirement provision imposed by by-law 2085 satisfies both aspects of the word "Bona fide". It is a condition honestly imposed and, on the basis of the evidence of the Corporation's witnesses, which I accept, it is a condition which reasonably and properly can be imposed in the special context of firefighters. . . . "

In giving the reasons of the Divisional Court in the City of North Bay case Hughes, J. had this to say:

> " Nevertheless the learned Inquiry Officer's finding that the mandatory retirement provision was a bona fide occupational qualification and requirement for Cosgrove's employment was a finding of fact. ... It was he who heard the evidence and under the circumstances was the only authority capable of judging the good faith of the assertions made before him. ... Such a finding which, in my view, he was entitled to make, should not be disturbed and I would dismiss the appeal, allowing the respondent municipality its costs. "

Arnup, J.A. in giving the reasons of the Court of Appeal in the City of North Bay case stated:

> " Two grounds were put forward upon which it was submitted that leave to appeal should be granted. The first was that there was an important question of law involved concerning the interpretation of s. 4(6) of the Ontario Human Rights Code, and particularly with respect to the definition of the words 'bona fide as used in that subsection. The second was whether there was any evidence to bring the municipality within the subsection, as properly interpreted. We did not call upon counsel for the respondent to answer the second submission, since we agree with the Divisional Court that there was evidence upon which the Board of Inquiry could reach the conclusion that he did.
>
> On the first ground, we agree with the test of bona fides as stated by the Board of Inquiry. Accordingly we refuse leave to appeal, with costs. "

The test of bona fides as stated by the Board of Inquiry and approved of by the Court of Appeal in the City of North Bay case requires that the employer in imposing

the age limitation act honestly or with sincere intentions and that the limitation be supported in fact and reason based on the practical reality of the work-a-day world.

The appellant in the case before us submits that the Board of Inquiry (Mr. Bruce Dunlop) did not give that meaning to the words "bona fide" in finding that the Borough of Etobicoke had contravened section 4(1)(b) of The Ontario Human Rights Code.

The reasons of Mr. Dunlop read in part as follows:

> " It is evidently now common for Ontario municipalities to have agreements with their firefighters calling for compulsory retirement at the age of 60. Estimates by various witnesses ranged from 60% to 85% of municipalities. The essential issue is whether or not this constitutes discrimination on the basis of age and if the estimates given are accurate it is an issue of no small importance. ... At first blush, requiring someone to retire at age 60 would thus appear to offend the Code. On the other hand, by virtue of s. 4(6) discrimination does not offend the Code where 'age, sex, or marital status is a bona fide occupational qualification and requirement for the position or employment'. It is contended that this exemption applies in the case of firefighters because the occupation is physically strenuous and hazardous and the ability to cope with its requirements diminishes as one grows older.

...

It was conceded that not all firefighters have lost the capacity to meet the requirements of the job by the time they reach the age of 60. Indeed, it was conceded that Messrs. Hall and Gray still possessed the necessary capacity when they reached retirement age. It was agreed, as well, that a firefighter might possibly lose the capacity even before reaching the age of 60. One could probably conclude, therefore, that physical and mental capacity rather than age should be regarded as the 'bona fide occupational qualification and requirement'. It was contended, however, that no satisfactory method of assessing capacity was available and that the only solution was to choose an admittedly arbitrary cut-off point that would minimize the risks to the individuals concerned, their colleagues and the public that might arise out of the loss of capacity attributable to aging. Sixty, it was argued, was the appropriate age and thus being no more than 60 was a bona fide occupational qualification and requirement.

One of the first things the Board must determine is the meaning of the expression 'bona fide' as applied to an 'occupational qualification and requirement' in the context of an anti-discrimination statute. One of the objectives of the Code is to ensure that people in the age range forty to sixty-four, who in the past often have been discriminated against in respect of employment opportunities, are not prevented from working simply because they are believed to be too old. If they are to be prevented from filling available jobs it must be because they have shortcomings apart from age. The exception in s. 4(6) recognizes that for some jobs people from forty to sixty-four may be too old. The meaning of 'bona fide' that seems most consistent with this objective would be 'real' or 'genuine' i.e. that there is a sound reason for imposing an age limitation, and the onus of establishing this justification for discrimination is on the person alleging it to be justified.

...

The conclusion of the Board is that the evidence falls short of establishing in this case that it is a bona fide occupational requirement of firefighters that they be no more than sixty years of age.

...

The most compelling witness on the issue of the age requirement was the deputy chief of the Etobicoke Fire Department, Mr. J. Ross Bissell. It was Mr. Bissell's view not only that firefighters should be allowed to retire at the age of 60 but that they should be required to do so. Mr. Bissell certainly convinced me, as he obviously convinced others when he was an executive member of the Ontario Firefighters Association, that firefighters should be allowed to retire at age 60. His evidence did not, however, convince me that firefighters should be required to retire at age 60 and that the age was a bona fide occupational qualification and requirement.

...

Mr. Bissell said, however, as did Mr. John DeVaal, Director of Personnel for the Borough, that no tests had been developed for determining the capabilities of firefighters to continue to perform effectively and safely. If this be so, it is difficult to see how one could say with any confidence that the age of 60 was the point beyond which a sufficiently high proportion of firefighters could no longer perform effectively and safely as to make retirement at this age a bona fide condition and requirement of the job.

Mr. Bissell's reasons for concluding that 60 was an appropriate age (indeed, his preference would be for a system under which firefighters would work for thirty years and then retire regardless of age) were, it seemed to me, primarily impressionistic. He indicated that when he was an active member of the

...

local and provincial associations it became obvious as they got older that they wouldn't want to be out fighting fires at the age of 65 and they felt justified in pressing for a retirement age of 60. He stated that there is a great deal of excitement and tension involved in responding to a fire, that it involves moving from a state of inactivity to one of violent activity under conditions of potential danger and that it becomes more difficult the older one gets. Recovery time becomes longer.

While these are all sound reasons for allowing a firefighter to retire at the age of 60 they do not seem to me to be reasons for compelling it, absent some scientific or statistical data to prove that beyond the age of 60 firefighters become less effective and less safe. Mr. Bissell referred to health and safety symposia where the issue of the physical demands of firefighting had been discussed, to discussions various local associations have had with medical officers of health to find out the effect of firefighting on the human body, to tests on firefighters that have been conducted at the University of Notre Dame in the United States, to statistics being gathered by the Toronto Fire Department and to other indications of professional medical interest in considering the problem area. No precise scientific evidence was presented, however.

Mr. DeVaal, who participated in contract negotiations with the Association on behalf of the Borough, indicated that the most significant factors in persuading management to accept the 60 age limit were the fact that the majority of fire departments in the province seemed to have accepted it and the fact that it would make the Etobicoke retirement age uniform. The third reason given by Mr. DeVaal was that, according to the union, firefighting was a 'young man's game' but he agreed that management had been presented with no precise evidence in support of this proposition.

...

Mr. John Carney, an acting captain with eighteen years experience in the Etobicoke Department, who was secretary of the Association at the time the agreement on compulsory retirement at age 60 was reached said that the provision was discussed by the membership of the Association and that the main reason for supporting it was bringing the retirement ages into line. The hardship involved in performing the strenuous work as one got older was also discussed.

It would appear, therefore, that the Etobicoke decision was based largely on the view that, like shorter working hours and higher pay, early retirement appealed as a desirable benefit of a rigorous job. The decision was not unaffected by the generally held view that firefighting is a 'young man's game' but was not based on any scientific conclusion that there was a significant increase in the risk to individual firefighters, to their colleagues or to the public at large in allowing firefighters to work beyond the age of 60.

...

If firefighters are to be required to retire at age 60, as opposed to being allowed to retire at age 60 as they may now do for example, in the City of Toronto, attempts should be made to develop a medical justification. It seems to me that the necessary evidence may not now be available because the necessary scientific attention has yet to be paid to the problem. That may be the reason there are no known tests of a firefighter's capacity. It may well be that all that exists for the time being is impressions like those of Mr. Bissell which, although based on years of experience, are not sufficiently precise to justify an arbitrary, mandatory retirement age of 60. "

The evidence of Deputy Chief Ross Bissell referred to in the reasons of Mr. Dunlop was to the effect that, because of the demands of the work and the physical deterioration that occurs as aging progresses, all firefighters should be required to retire at age 60. He based his opinion on his very considerable experience with firefighting.

Mr. Dunlop referred to the evidence of Mr. Bissell as being primarily impressionistic, and he stated that in the absence of precise scientific or statistical data to prove that beyond the age of 60 firefighters become less effective and less safe, he was not convinced that firefighters should be required to retire at age 60, and that such age was a bona fide occupational qualification and requirement.

He appears not to have put his mind at all to the question of whether the Borough in agreeing to the age limitation acted honestly and with sincere intentions, and in requiring a scientific conclusion that there was a significant increase in the risk to individual firefighters, their colleagues or to the public at large in allowing firefighters to work beyond the age of 60, he was requiring the employer to do far more than to show that the age

limitation was supported in fact and reason based on the practical reality of the work a day world.

In my view the evidence indicates that in agreeing to the 60 year age limitation, and enforcing it, the Borough of Etobicoke honestly believed that it was doing that which was in the best interest of its firefighters individually and collectively, and of the public which they serve. I am further of the view that an employer can establish that an age limitation requirement is bona fide without bringing forward scientific or statistical data to prove it, although, of course, such evidence is desirable if it is available.

Mr. Dunlop did not suggest that the opinions expressed before him by men of vast experience that firefighting was a "young man's game", or the opinion of Deputy Chief Bissell that firefighters should retire at age 60 or earlier was not honestly held by them. Such evidence was sufficient to establish that mandatory retirement at age 60 was a reasonably necessary requirement for firefighters, and so a "bona fide" occupational requirement for firefighters.

One other matter is worthy of comment. The evidence before Mr. Dunlop was to the effect that as many as 85% of the Firefighters Associations in Ontario, by arguing that the physical and mental demands of firefighting are such that firefighters should be required to retire at age 60, have convinced the municipalities that employ them that such is the case and to assume the added financial burden involved in retiring firefighters at that age. Where, at the request of the firefighters themselves, often supported by elaborate briefs as to why retirement at age 60 should be required, 85% of the collective agreements in Ontario under which firefighters are employed provide for mandatory retirement at age 60, that fact in itself is strong evidence that mandatory retirement at age 60 is a bona fide occupational requirement for firefighters.

Accordingly, then, I would allow the appeal and set aside the decision of the Board of Inquiry which held that the Borough of Etobicoke had contravened s. 4(1)(b) of The Ontario Human Rights Code and any penalty or requirement based thereon. I would find that the said Borough did not contravene the said section. I would make no order as to costs.

Released: September 20, 1979

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

O'Leary, Cory and Osborne, JJ.

IN THE MATTER OF The Ontario Human Rights Code R.S.O. 1970, c. 318, as amended;

AND IN THE MATTER OF two complaints laid by Harold E. Hall against International Firefighters Association, Local 1137 the Etobicoke Professional Firefighters Association and a complaint against the Borough of Etobicoke Fire Department;

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Respondents

REASONS FOR JUDGMENT

O'Leary, J.

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O'LEARY, CORY, OSBORNE, JJ.

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Respondents

R. Dunsmore, Esq.
for the Appellant

J. Polika, Esq., Q.C.
for Human Rights Commission

H. Goldblatt, Esq.
for International Firefighters Association

Heard: June 18, 1979

CORY, J. (DISSENTING)

The applicant Borough seeks judicial review of the decision of a Board of Inquiry convened pursuant to the

provisions of the Ontario Human Rights Code. The Board decided that the Borough had breached section 4(1)(b) of that Act and ordered the reinstatement of Messrs. Gray and Hall, on the grounds that the Borough had not established that firefighters should be required to retire at age 60.

The Borough and the International Firefighters Association, Local 1137 were parties to a collective agreement dated December the 20th, 1976 which expired December the 21st, 1977. That agreement provided for the compulsory retirement of firefighters at age 60. Harold E. Hall was a District Chief and Vincent Gray was a Captain in the Fire Department of the Borough. Both were firefighters within the terms of the collective agreement. Messrs. Gray and Hall reached their 60th birthdays in 1976 and were subject to retirement in September of that year in accordance with the terms of the collective agreement.

Messrs. Hall and Gray filed complaints of age discrimination in July 1976 with the Ontario Human Rights Commission.

A hearing was duly convened and Mr. Bruce Dunlop acted as the hearing officer. In the course of the hearing Messrs. Gray and Hall confirmed that they knew that they were required to retire at age 60 and had ratified the collective bargaining agreement which provided for retirement at that age. It is thus apparent that the Borough has at all time acted in the utmost good faith. It was not the Borough but rather the union which bargained for

and obtained the compulsory retirement age of 60. It was the union which convinced the Borough that this was an appropriate age for the retirement of the firefighters.

At the hearing evidence was given that firefighting was "a young man's game". However, it was conceded that not all firefighters lose their capacity to meet the requirements of their job when they reach the age of 60. It was submitted that Messrs. Hall and Gray possessed the necessary ability to work as firefighters when they reached the retirement age. It was also conceded that a firefighter might lose his capacity to perform his task even before reaching the age of 60.

Mr. Dunlop (sitting as the Board of Inquiry) concluded that the evidence fell short of establishing in the case before him that it was a bona fide occupational requirement that firefighters be no more than 60 years of age.

It was argued that the Board imposed an impossible test for the Borough to meet in its attempt to establish that it was a bona fide occupational requirement of firefighters that they be no more than 60 years of age. The Board indicated that to be satisfied

it would require some scientific or statistical data to prove that beyond the age of 60 firefighters are less effective and less safe. It is said that the Board's own reasons demonstrated the impossibility of that test for it indicated that there was no known test that would provide the information required and that it might well be impossible to devise such a test.

It is necessary to set out some of the provisions of the Ontario Human Rights Code, R.S.O. 1970, c.318. Section 4(1)(b) provides:

> "4.(1) No person shall,
>
> (b) dismiss or refuse to employ or to continue to employ any person;
>
> because of race, creed, colour, age, sex, marital status, nationality, ancestry, or place of origin of such person or employee."
>
> "4.(6) The provisions of this section relating to any discrimination, limitation, specification or preference for a position or employment based on age, sex or marital status do not apply where age, sex or marital status is a bona fide occupational qualification and requirement for the position or employment."

On its fact the collective bargaining agreement appears to be in breach of section 4(1)(b) of the Human Rights Code. The question the Board had to determine was whether or not the requirement that the firefighters be less than 60 years of age was a "bona fide occupational qualification and requirement for the position or employment." This is the very question that was explored. The findings of the Board were phrased in this way:

> "The conclusion of the Board is that the evidence falls short of establishing in this case that it is a bona fide occupational requirement of firefighters that they be no more than sixty years of age."

The conclusion is clear and simply worded. The problems arise from the statement made by the Board under the heading "Analysis of Evidence". Under that heading the following statements appear:

> "The most compelling witness on the issue of the age requirement was the deputy chief of the Etobicoke Fire Department, Mr. J. Ross Bissell. It was Mr. Bissell's view not only that firefighters should be allowed to retire at the age of 60 but that they should be required to do so. Mr. Bissell certainly convinced me, as he obviously convinced others when he was an executive member of the Ontario Firefighters Association, that firefighters should be allowed to retire at age 60. His evidence did not, however, convince me that firefighters should be required to retire at age 60 and that the age was a bona fide occupational qualification and requirement."

.....

"Mr. Bissell said, however, as did Mr. John DeVaal, Director of Personnel for the Borough, that no tests had been developed for determining the capabilities of firefighters to continue to perform effectively and safely. If this be so, it is difficult to see how one could say with any confidence that the age of 60 was the point beyond which a sufficiently high proportion of firefighters could no longer perform effectively and safely as to make retirement at this age a bona fide condition and requirement of the job.

Mr. Bissell's reasons for concluding that 60 was an appropriate age (indeed, his preference would be for a system under which firefighters would work for thirty years and then retire regardless of age) were, it seemed to me, primarily impressionistic."

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"While these are all sound reasons for allowing a firefighter to retire at the age of 60 they do not seem to me to be reasons for compelling it, absent some scientific or statistical data to prove that beyond the age of 60 firefighters become less effective and less safe."

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It would appear, therefore, that the Etobicoke decision was based largely on the view that, like shorter working hours and higher pay, early retirement appealed as a desirable benefit of a rigorous job. The decision was not unaffected by the generally held view that firefighting is a "young man's game" but was not based on any scientific conclusion that there was a significant increase in the risk to individual firefighters, to their colleagues or to the public at large in allowing firefighters to work beyond the age of 60.

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"If firefighters are to be required to retire at age 60, as opposed to being allowed to retire at age 60 as they may now do for example, in the City of Toronto, attempts should be made to develop a medical justification. It seems to me that the necessary evidence may not now be available because the necessary scientific attention has yet to be paid to the problem. That may be the reason there are no known tests of a firefighter's capacity. It may well be that all that exists for the time being is impressions like those of Mr. Bissell which, although based on years of experience, are not sufficiently precise to justify an arbitrary, mandatory retirement age of 60."

.....

Supplementary reasons were given dated the 7th day of December, 1978 where it was stated:

"Mr. Dunsmore, however, submitted that in light of the decisions of the Divisional Court and the Court of Appeal (particularly the latter) in Re Ontario Human Rights Commission and City of North Bay I should consider my earlier decision to be in error and should not proceed to make an award in favour of Mr. Hall on the basis of an erroneous decision. The Court of Appeal expressly stated that it agreed with the test of bona fides as stated by the Board of Inquiry in that case. However, I do not see a significant inconsistency between the test as enunciated in my earlier reasons and that propounded by Professor Mackay in the North Bay case. Professor MacKay said this:

> 'Bona fide' is the key word. Reputable dictionaries whether general (such as Oxford and

> Webster) or legal (such as Black) regularly define the expression in one or several of the following terms, viz., honestly, in good faith, sincere, without fraud or deceit, unfeigned, without simulation or pretense, genuine.

While Professor Mackay stresses honesty and sincerity whereas I focussed on reality or genuineness I think we were both getting at the same concept. We were recognizing that scientific certainty was not required but that whim or prejudice was not enough. I am not aware of what evidence Professor Mackay heard. According to the evidence I heard, as I indicated in my earlier reasons 'the Etobicoke decision was based largely on the view that, like shorter working hours and higher pay, early retirement appealed as a desirable benefit of a rigorous job.' I was not persuaded that the collective bargaining which led to the by-law making retirement compulsory at age 60 was motivated by any belief that, beyond the age of 60, there was any particular increase in the hazard either to the firefighter or to the public in allowing the fire-fighter to continue to work. While efforts were made at the hearing to justify the by-law on this alternative ground, my conclusion was that "while these are all sound reasons for allowing a firefighter to retire at the age of 60 they do not seem to me to be reasons for compelling it."

The test enunciated by the Board in Re Ontario Human Rights and City of North Bay (1977), 17 O.R. (2d) 712 was specifically approved by the Court of Appeal in the oral reasons given by Mr. Justice Arnup refusing leave to appeal from the decision of the Divisional Court. There the test was described in these words:

"The issue, simply stated, is whether a mandatory retirement age of sixty, regardless of a particular individual's ability, capacity or competency, is a bona fide occupational qualification and requirement for the position or employment of a fireman whithin the meaning of sec.4(6) of the Human Rights Code.

'Bona fide' is the key word. Reputable dictionaries whether general (such as Oxford and Webster) or legal (such as Black) regularly define the expression in one or several of the following terms, viz., honestly, in good faith, sincere, without fraud or deceit; unfeigned, without simulation or pretense, genuine. These terms connote motive and a subjective standard. Thus a person may honestly believe that something is proper or right even though, objectively, his belief may be quite unfounded and unreasonable. Applying this solely subjective standard I have no doubt whatsoever that the Corporation in enacting by-law 2085 and negotiating the collective agreement upon which it is founded were acting honestly, as opposed to maliciously, deceitfully or for some oblique or ulterior purpose in disguise.

However, that cannot be the end of the matter or the sole meaning to be attributed to 'Bona Fide' for otherwise standards would be too ephemeral and would vary with each employer's own opinion (including prejudices), so long as it is honestly held, of the requirements of a job, no matter how unreasonable or unsupportable that opinion might be. Thus an airline may sincerely feel that its stewardesses should not be over 25 years of age. However if it requires such a limitation as a condition of employment or continuing employment I would have no doubt that such limitation would not qualify as a bona fide occupational qualification or requirement under the exemption created by sec.4(6). Why? Because, in my opinion, such a limitation lacks any objective basis in reality or fact.

> In other words, although it is essential that a limitation be enacted or imposed honestly or with sincere intentions it must in addition be supported in fact and reason 'based on the practical reality of the work a day world and of life' (adopting the words of Mr. O'Neill in his summation)."

The Board in this case determined that a maximum age of 60 could not be accepted as a bona fide qualification of employment absent some compelling scientific or statistical data to prove that beyond age of 60 a firefighter became less effective and less safe. It is said that an error that is properly reviewable was thus committed by the Board in applying such an impossible test.

In my opinion, a careful review of the reasons indicate that this was not the position of the Board.

The supplementary reasons quite properly indicate the similarity of the test applied in this case to that which was applied in the North Bay case.

Here, the Board's conclusion makes it quite clear that in this case the evidence fell short of establishing that the age requirement was a bona fide occupational requirement. The evidence of the prime witness, Mr. Bissell, appeared to be "primarily impressionistic". The reference made by the Board to scientific testing does not form the basis for its conclusion. Rather it is the "impressionistic" evidence which fails to satisfy the Board of the Borough's position and governs its finding. A review of the transcript of the evidence seems to confirm the Board's conclusion.

In passing I might say that quite apart from scientific testing one can think of no better evidence than that of an experienced firefighter testifying as to his observations of the incompetence or lack of skills of firefighters over the age of 60. If such evidence had been given there is no doubt the Board would have been satisfied with the retirement age of 60 as a job requirement. Such was not the evidence that was brought before the Board in this case.

The Court should not disturb a finding of fact that has been made by a Board of Inquiry established under The Human Rights Act. This principle was expressed with his customary clarity and force by Hughes, J. speaking for the Divisional Court in Re Ontario Rights Commission and the City of North Bay, (supra). In this case a finding of fact has been made by the Board of Inquiry and it ought not to be disturbed.

A complaint was made of the compensation awarded by the Board. It was argued that the hearing was unduly delayed and that the Borough should not be responsible for such delay. Further it was said that inadequate steps were taken by the dismissed firefighters to minimize their damages. Either or both of those grounds may be a very valid basis for reducing the damages or the compensation awarded. However, in this case the firefighters have taken every reasonable step to minimize their loss. Further there was not such a delay in the hearing that should excuse the Borough from the payment of the compensation award made by the Board. This complaint cannot be accepted.

The application should, in my view, be dismissed but in the circumstances without costs.

Some reference should be made to the unhappy situation that presently confronts firefighters in the Province. Firefighters in many municipalities have bargained in good faith and secured as a term of their collective bargaining agreement a clause which provides for mandatory retirement at age 60. The younger firefighters no doubt rely on this provision in considering their future prospects for promotion and comparing their position as a firefighter with alternate employment. The firefighters of retirement age, in an era of rapidly escalating inflation, understandably seek to maintain their employment as long as possible, not only to maintain their current level of pay but also to improve their pension benefits.

There are now at least three separate instances wherein a Board of Inquiry has considered the bona fides of the mandatory retirement age of 60 as a job qualification of employment. In one instance (the North Bay case) the Board was satisfied on the evidence before it of the bona fides of the age qualification. In two other instances (one being this case) the Board has not been satisfied on the evidence heard by it that the mandatory retirement age was a proper employment qualification. The findings of the Board in these three instances depended, as will future findings of future Boards, upon the evidence heard by the particular Board. The findings of fact by a Board in a case should not

as a rule be interfered with by the Court. There is thus a lack of uniformity that can only lead to frustration and discontent among the ranks of firefighters. Their task requires great skill, courage and dedication. They perform a vital and essential service for the people of this Province who rely upon them in times of emergency. Firefighters should not be faced with the frustration that emanates from this unhappy situation.

Dated: September 20 , 1979.

IN THE SUPREME COURT OF ONTARIO

DIVISIONAL COURT

O'LEARY, CORY, OSBORNE, JJ.

IN THE MATTER OF The Ontario Human Rights Code, R.S.O. 1970, c.318 as amended;

AND IN THE MATTER OF two complaints laid by Harold E. Hall against International Firefighters Association Local 1137 the Etobicoke Professional Firefighters Association and a complaint against the Borough of Etobicoke Fire Department;

AND IN THE MATTER OF two complaints laid by Vincent Gray against International Firefighters Association, Local 1137 the Etobicoke Professional Firefighters Association and a complaint against the Borough of Etobicoke Fire Department;

B E T W E E N:

THE BOROUGH OF ETOBICOKE

Appellant

- and -

THE ONTARIO HUMAN RIGHTS COMMISSION and BRUCE DUNLOP and HAROLD E. HALL and VINCENT GRAY

Respondents

REASONS FOR JUDGMENT

Cory, J.

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